**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2010-CA-00526-COA**

**RUTH AGNES CROSTHWAIT** **APPELLANT**

**v.**

**SOUTHERN HEALTH CORPORATION OF HOUSTON, INC. D/B/A TRACE REGIONAL HOSPITAL AND MARCIA MORGAN** **APPELLEES**

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| DATE OF JUDGMENT: | 03/03/2010 |
| TRIAL JUDGE: | HON. ANDREW K. HOWORTH |
| COURT FROM WHICH APPEALED: | CHICKASAW COUNTY CIRCUIT COURT |
| ATTORNEY FOR APPELLANT: | WILLIAM C. WALKER JR. |
| ATTORNEYS FOR APPELLEES: | JOHN G. WHEELER<br>BETHANY CAROL BRYANT |
| NATURE OF THE CASE: | CIVIL - PERSONAL INJURY |
| TRIAL COURT DISPOSITION: | SUMMARY JUDGMENT GRANTED TO DEFENDANTS |
| DISPOSITION: | AFFIRMED: 06/07/2011 |
| MOTION FOR REHEARING FILED: | |
| MANDATE ISSUED: | |

**BEFORE GRIFFIS, P.J., MYERS AND CARLTON, JJ.**

**GRIFFIS, P.J., FOR THE COURT:**

¶1. Ruth Agnes Crosthwait fell and broke her hip while an inpatient at Trace Regional Hospital. She brought a lawsuit against Southern Health Corporation of Houston, Inc., which owns and operates the hospital, and Marcia Morgan, a registered nurse who is employed by the hospital. Crosthwait alleged that the hospital negligently caused her to fall after a shower in her hospital room. Crosthwait couched her claim as one for "ordinary" negligence, rather than for malpractice. The hospital contended that Crosthwait's claim was for medical

malpractice, in substance, and it sought summary judgment because Crosthwait failed to offer presuit notice, failed to consult with an expert prior to filing suit, and failed to support her claim with expert testimony. The Chickasaw County Circuit Court granted summary judgment to the hospital, and Crosthwait appeals.

FACTS

¶2. Crosthwait was admitted to Trace Regional Hospital on May 22, 2008, for treatment of fluctuating blood sugar stemming from diabetes. Crosthwait was eighty-two years of age. She lived alone and generally could walk without assistance, but she sometimes used a quad cane when walking outside. Crosthwait's attending physician instructed her to ring a bell to have a nurse assist her when she used the restroom, which was attached to her hospital room. Over the course of her stay, Crosthwait followed her doctor's instructions. The nurses had observed Crosthwait, but they did not physically assist her.

¶3. On the afternoon of May 24, Crosthwait was preparing to leave the hospital, and she decided to take a shower. Crosthwait called for Morgan, who assisted her with undressing. Crosthwait walked into the bathroom unassisted. Morgan offered Crosthwait a shower stool, which she accepted. Morgan then left and returned with a chair, which she placed in the shower. Morgan then turned on the shower for Crosthwait. While Crosthwait showered, Morgan told Crosthwait she would have to leave to attend another patient. After some time, Morgan returned and turned off the shower. During the shower, the bathroom floor became wet. What happened next was disputed.

¶4. According to Crosthwait, water had puddled on the bathroom floor during the shower

because the shower curtain was not closed. Crosthwait felt Morgan had been gone for a long time, and Crosthwait had been unable to turn off the water herself or move around in the shower because of the size of the shower chair. When Morgan returned, Crosthwait asked her to turn the water off, which she did. Crosthwait then asked Morgan for a towel, and Morgan handed her one. Crosthwait's shoes had been on the bathroom floor during the shower, and they were wet. Crosthwait tried to put on the wet shoes, but she could not. She asked Morgan to get some dry shoes, apparently referring to another pair of shoes she had brought with her to the hospital. Morgan stated that she did not have any shoes for Crosthwait. Morgan offered Crosthwait a single towel, which Crosthwait used to dry herself. When Crosthwait was preparing to leave the bathroom, Morgan was standing in the doorway between Crosthwait's hospital room and the hallway outside. Crosthwait stated, "I need some help – I've got to get out of here," several times, but Morgan did not offer to assist her. Crosthwait then tried to walk back to her bed, but she slipped and fell while passing through the doorway between the bathroom and the hospital room.

¶5. Morgan stated in her deposition that she laid two towels on the floor before Crosthwait started showering. After the shower, Morgan helped Crosthwait dry herself, and Morgan used several more towels to dry the floor. Crosthwait refused to use her shoes, even after Morgan had dried them, so Morgan attempted to lead her back to the bed without them. Morgan took one hand, and Crosthwait used her quad cane with the other. While passing through the doorway from the restroom to the hospital room, which was not wide enough for both women to walk side by side, Crosthwait fell.

¶6. It was undisputed that the fall caused Crosthwait significant injury, including a broken hip and a loss of mobility and independence. Crosthwait filed suit against the hospital and Morgan. Crosthwait's complaint alleged that the following were the proximate causes of her fall and injuries:

> (a) Failure to properly assist [Crosthwait] in taking a shower, including failure to provide an appropriate shower stool and failure to prevent excessive water from accumulating on the floor outside the shower;
>
> (b) Failure to assist [Crosthwait] in getting out of the shower;
>
> (c) Failure to assist [Crosthwait] as she stepped on the floor while exiting the shower;
>
> (d) Failure to provide [Crosthwait] with proper footwear before she stepped on the wet floor when exiting the shower;
>
> (e) Failure to wipe up the wet floor before [Crosthwait] exited the shower; [and]
>
> (f) Failure to do other reasonable acts necessary to prevent [Crosthwait's] fall.

¶7. After discovery was completed, the hospital filed a motion for summary judgment. The hospital argued that Crosthwait's action was for medical malpractice and that summary judgment was proper because, among other things, Crosthwait needed expert testimony to establish the duty of care owed to her by the hospital and to show whether that duty had been breached. Crosthwait responded that the claim was for ordinary negligence, for which expert testimony was not required. The circuit court granted summary judgment to the hospital, and Crosthwait appeals.

## STANDARD OF REVIEW

¶8. We review a trial court's grant of summary judgment de novo. *Treasure Bay Corp. v. Ricard*, 967 So. 2d 1235, 1238 (¶10) (Miss. 2007). This Court "examines all the evidentiary matters before it – admissions in pleadings, answers to interrogatories, depositions, affidavits, etc." *City of Jackson v. Sutton*, 797 So. 2d 977, 979 (¶7) (Miss. 2001) (citations omitted). The moving party has the burden of demonstrating that no genuine issue of material fact exists, and the nonmoving party must be given the benefit of doubt concerning the existence of a material fact. *Id.* "If no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment should be entered in that party's favor." *Monsanto Co. v. Hall*, 912 So. 2d 134, 136 (¶5) (Miss. 2005). "A fact is material if it tends to resolve any of the issues properly raised by the parties." *Moss v. Batesville Casket Co., Inc.*, 935 So. 2d 393, 398 (¶16) (Miss. 2006) (citation and quotations omitted).

DISCUSSION

¶9. It is axiomatic that to recover for negligence, a plaintiff must prove the elements of a negligence claim, which are: (1) duty, (2) breach of duty, (3) causation, and (4) damages. *See, e.g., Fisher v. Deer*, 942 So. 2d 217, 219 (¶6) (Miss. Ct. App. 2006) (citation omitted). Duty and breach of that duty establish the negligence, while causation and damages are required to show that the plaintiff is entitled to recover for harm resulting from the negligent act. *Id.*

¶10. Malpractice is a special kind of negligence claim that involves professional services. Malpractice claims generally must be supported by expert testimony to "identify and

articulate the requisite standard that was not complied with [and] establish that the failure was the proximate cause, or proximate contributing cause, of the alleged injuries." *Hubbard v. Wansley*, 954 So. 2d 951, 957 (¶12) (Miss. 2007) (quoting *Barner v. Gorman*, 605 So. 2d 805, 809 (Miss. 1992)). The only exception to the expert-testimony requirement is where the alleged professional negligence is within the scope of a layman's common knowledge. *Powell v. Methodist Health Care – Jackson Hosps.*, 876 So. 2d 347, 348 (¶4) (Miss. 2004).

¶11. On appeal, Crosthwait contends that she did not have to offer expert testimony because her claim is only for "ordinary" negligence, not malpractice. To distinguish between malpractice claims and ordinary negligence, a court should consider: "(1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of professional judgment beyond the realm of common knowledge and experience." 65 C.J.S. *Negligence* § 160 (2010). While Crosthwait disagrees, this Court finds that her claim arose in the course of professional medical services. Although showering was not necessarily a medical procedure, in this case, Crosthwait was an inpatient at the hospital. Crosthwait's attending physician had instructed her to seek a nurse's assistance when using the restroom. When Morgan assisted Crosthwait, she was acting as a registered nurse attending to a patient in her care. Thus, the real question presented by this appeal is whether Crosthwait's claim raises questions of Morgan's professional judgment outside a layman's common knowledge. If so, Crosthwait failed to meet her burden of proof because she did not offer expert testimony establishing Morgan's duty of care or a breach of that duty.

¶12. "Our general rule is that medical negligence may be established only by expert medical testimony, with an exception for instances where a layman can observe and understand the negligence as a matter of common sense and practical experience." *Coleman v. Rice*, 706 So. 2d 696, 698 (¶10) (Miss. 1997) (quoting *Erby v. N. Miss. Med. Ctr.*, 654 So. 2d 495, 500 (Miss. 1995)). Examples of the layman's exception would be a case involving "the unauthorized and unexplained leaving of an object inside a patient during surgery," *id.* at 698 (¶11), or a patient being given the wrong medication. *Smith ex rel. Smith v. Gilmore Mem'l Hosp., Inc.*, 952 So. 2d 177, 181 (¶11) (Miss. 2007).

¶13. Crosthwait attempts to remove her claim from the realm of medical malpractice by focusing on two alleged negligent acts: Morgan's selection of the shower stool, which Crosthwait contends was too large for the shower, with arms that prevented the shower curtain from being closed, and Morgan's failure to dry the floor before Crosthwait tried to walk across it. Crosthwait argues that these claims, despite the hospital setting, are "ordinary" acts that a layman can understand are negligent without expert testimony. Crosthwait analogizes her claim to an "ordinary slip and fall."

¶14. The selection of a shower stool is clearly outside a layman's common knowledge. Crosthwait argues that the choice was negligent because the stool prevented the shower curtain from being fully closed. But it is apparent that the stool would not be selected simply to fit in the shower, since its primary purpose would be to provide adequate support for Crosthwait while she showered. A nurse would have to evaluate Crosthwait's need for support and choose a stool that would satisfy it. If anything, the nurse would have to balance

Crosthwait's needs against the danger posed by the stool not fitting easily in the shower. This calls for professional judgment, and the layman's exception does not apply to "situations involving judgment calls made by professionals." *Smith*, 952 So. 2d at 181 (¶11).

¶15. In *Bell v. West Harrison County District*, 523 So. 2d 1031, 1032 (Miss. 1988), Doris Bell was injured when she fell from her hospital bed. She claimed that her fall was a result of the nurse's failure to raise the rails on the bed. *Id.* In an issue related to the proper statute of limitations, Bell argued that the nurse's failure to raise the rails was an act of ordinary negligence that did not involve medical or professional services. *Id.* at 1032-33. The Mississippi Supreme Court disagreed, stating:

> A nurse's decision as to whether or not bed rails should be utilized entails a degree of knowledge concerning the subject patient's condition, medication, history, etc. The rails themselves are but another instrumentality by which the safety of patients may be insured. This plainly calls for the rendition of a medical or professional service, even under the most basic rationale. The failure to raise Mrs. Bell's bed rails may have been a negligent omission on the part of the nurse, but if it were, it was negligence inherently connected with the providing of a professional medical service.

*Id.* at 1033.

¶16. The dissent argues that Crosthswait does not allege her injury occurred based on the negligent use of a medical device; therefore, her claim is distinguishable from *Bell*. But Crosthwait testified that Morgan recommended that she utilize a shower stool after Crosthwait entered the shower. Just as in *Bell*, this decision required that Morgan have a degree of knowledge as to Crosthwait's medical condition. Morgan decided to have Crosthwait use the stool even after the stool did not properly fit in the shower, and the

shower curtain could not be closed causing the bathroom floor to become wet. Such a decision fell within Morgan's professional service as a nurse.

¶17. Crosthwait's second contention, that Morgan should have dried the floor for her, is more difficult. It is true, as Crosthwait argues, that a layman can recognize that a wet floor presents some risk of slipping. And the dissent contends that Crosthwait's injury did not involve an assessment of Crosthwait's condition. But whether a wet floor creates an unreasonable danger depends on the person trying to walk across it – a healthy individual might be able to dry the floor herself/himself after bathing or safely cross the floor even if it is wet, while a person in poor health might not be able to do either. What assistance Crosthwait needed depended, again, on an evaluation of her medical condition. That required the exercise of professional judgment. Morgan had to considered Crosthwait's condition in determining the level of assistance Crosthwait would need to exit the shower and walk across a wet floor.

¶18. In support of her argument, Crosthwait cites the following exchange from Morgan's deposition:[1]

> Q. Now, did you need some special knowledge to know how to put those towels down? Did you have to be a nurse to know how to put the towels down?
>
> A. No.
>
> Q. Okay, did you have to be a nurse to know how to try to lead

[1] The hospital's attorney objected to the "form" of each question, but for clarity, we have not included the objections.

[Crosthwait] out and not fall?

A. No.

. . . .

Q. Did you have to know anything as a nurse to do anything that you did in connection with this incident of getting her in and out of the shower?

A. No.

Crosthwait contends that this amounts to an admission that professional judgment is not at issue. We do not agree. The first questions asked Morgan whether one needed to be a nurse to know "how" to place towels on a floor, which is not relevant to the issue at hand. The remaining two questions concern Morgan's version of the events, but Crosthwait's allegations of negligence are based on her own account, which is significantly different. Crosthwait's complaint is principally addressed to what she alleges Morgan had a duty to do, not what she actually did, according to Crosthwait. Crosthwait suggests in her briefs on appeal that the difference between the accounts is immaterial since both agree Crosthwait fell; but the fact that Morgan failed to prevent Crosthwait from falling is not proof of negligence, in and of itself. Moreover, the final question is vague and was properly objected to by the hospital's counsel.

¶19. After reviewing the record in this case, this Court finds that Crosthwait alleged malpractice and that expert testimony was required to support the cause of action. Consequently, the circuit court did not err in granting summary judgment to the hospital. We therefore affirm.

¶20. **THE JUDGMENT OF THE CIRCUIT COURT OF CHICKASAW COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

**MYERS, ISHEE AND CARLTON, JJ., CONCUR. IRVING, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY LEE, C.J. MAXWELL, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY LEE, C.J., IRVING, P.J., AND ROBERTS, J. BARNES AND RUSSELL, JJ., NOT PARTICIPATING.**

**IRVING, P.J., DISSENTING:**

¶21. I agree with the dissent by Judge Maxwell. However, I write separately to express my view that even if the actions of Nurse Morgan could be considered in the realm of professional actions or services, expert testimony was not required to establish that she was negligent in refusing or failing to assist her elderly patient traverse the admittedly wet floor. While expert testimony is generally required to prove negligence in medical malpractice cases, there is a recognized exception to this rule: the layman's exception. *Coleman v. Rice*, 706 So. 2d 696, 698-99 (¶¶10-11) (Miss. 1997). The layman's exception is applied in situations "where a layman can observe and understand the negligence as a matter of common sense and practical experience." *Id*. at 698 (¶10) (quoting *Erby v. N. Miss. Med. Ctr.*, 654 So. 2d 495, 500 (Miss. 1995)). While the exception is generally applied in situations where a physician or medical staff member has left a foreign object in a patient,[2] I see no reason why it would not apply here on the unique facts of this case. A layman certainly can observe and understand Nurse Morgan's negligence as a matter of common

[2] *Id.* at (¶11).

sense and practical experience. It does not take a medical expert to testify that a nurse commits a negligent act when she refuses to assist or refuses to obtain assistance for an elderly patient who is attempting to traverse a wet floor in order to return to bed. Therefore, for this additional reason, I dissent.

**LEE, C.J., JOINS THIS OPINION.**

**MAXWELL, J., DISSENTING:**

¶22. Not every act or omission by a medical professional is a professional act. With that in mind, I find it important that Crosthwait does not allege Nurse Morgan failed to assess and meet her medical needs. Instead, Crosthwait complains that, in assisting her with her shower, Morgan created a peril—a wet bathroom floor. And Morgan, allegedly knowing that approximately an inch of water had pooled on the bathroom floor, failed to attempt to dry the floor or respond to repeated requests to assist the eighty-two year old barefooted Crosthwait across the wet floor. Because I find Crosthwait brings an ordinary negligence claim, not a medical-malpractice action, I respectfully dissent.

**FACTS**

¶23. At this summary-judgment stage, many of the facts forming Crosthwait's theory are sharply contested by the hospital. But it is undisputed that Crosthwait, while a patient at Trace Regional Hospital, was under doctor's orders to call for assistance when going to and from the bathroom. During the course of her stay, Crosthwait called for assistance and made many uneventful bathroom trips. Before leaving the hospital, Crosthwait wanted to take a shower and called for Morgan's assistance. Crosthwait and Morgan have differing accounts

of what happened next.

¶24. Crosthwait's deposition testimony reflects that Morgan helped her undress and turned on the shower. Because of the height of the shower faucet, Morgan suggested a shower chair. Crosthwait testified the chair did not fit in the shower. After several placements, Morgan ultimately positioned the chair so that a portion of it and Morgan stuck out of the shower. Morgan then left to give another patient an insulin shot. Crosthwait testified that, because of the protruding chair, the shower curtain did not close. And during the five minutes Morgan was gone, the continuous running water began pooling on the bathroom floor. Crosthwait cannot remember whether she or Morgan turned off the shower. But she recalls Morgan returned to the bathroom and handed her a towel, which Crosthwait used to dry herself. Crosthwait asked Morgan for rubber-soled shoes because her leather-soled shoes had been left in the bathroom during the shower and were soaked. Morgan replied that the hospital did not have any. Crosthwait testified that Morgan stood outside the bathroom and did not respond to her repeated requests to help her out of the bathroom. So the barefoot Crosthwait attempted to leave unassisted. She began to fall, at which point, Morgan grabbed her arm and tried to prevent her fall.

¶25. Morgan's account differs. The treating physician's notes reflect that when Crosthwait "was about to take a bath [she] apparently slid down from the bed towards the floor and she was witnessed by the nurse." But Morgan could not recall telling the doctor that Crosthwait had slid from the bed to the floor. Instead, Morgan's deposition testimony clearly established that Crosthwait's injury occurred from a fall after her shower.

¶26. Morgan testified in her deposition that before turning on the shower she placed towels on the floor. After situating Crosthwait on the shower stool and turning on the shower, Morgan left to give another patient an insulin shot. Morgan returned and turned off the shower. She then placed two more towels on the floor. As she was physically assisting Crosthwait out of the bathroom, Crosthwait fell.

¶27. If Crosthwait's allegations are considered under ordinary negligence standards, I find these factual disputes preclude summary judgment. So the proper starting point is to determine whether her claim sounds in ordinary negligence or medical malpractice.

**LAW AND DISCUSSION**

¶28. In previous cases addressing this distinction, this court has emphasized the "main issue [is] whether the tort 'arises out of the course of medical, surgical or other professional services.'" *Chitty v. Terracina*, 16 So. 3d 774, 779 (¶12) (Miss. Ct. App. 2009) (quoting Miss. Code Ann. § 15-1-36(2) (Rev. 2003)); *see Bell v. W. Harrison County Dist.*, 523 So. 2d 1031, 1032 (Miss. 1988) (addressing "arising out of" language in section 15-1-36).[3] We have also looked for guidance in addressing that issue to Louisiana's six-factor test from *Coleman v. Deno*, 813 So. 2d 303, 315-16 (La. 2002). *Chitty*, 16 So. 3d at 778; *Howell v. Garden Park Cmty. Hosp.*, 1 So. 3d 900, 903-04 (¶¶7-8) (Miss. Ct. App. 2009). Among *Coleman*'s considerations are whether the alleged wrong (1) is treatment related or caused

[3] Mississippi Code Annotated section 11-1-58(1) (Supp. 2010) uses the same "arising out of the course of medical, surgical or other professional services" language to determine whether the prerequisite of an expert consultation applies to an action against a healthcare provider.

by want of professional skill, (2) involved an assessment of the patient's condition, or (3) was within the scope of activities a hospital is licensed to perform. *Coleman*, 813 So. 2d at 315-16. *Coleman* also includes in its test the question of whether expert testimony would be required to establish the standard of care. *Id.* at 315.

¶29. Using *Coleman* as a guide, I do not find Crosthwait alleges an injury "arising out of the course of medical, surgical or other professional services where expert testimony is [required]." Miss. Code Ann. § 11-1-58(1). Although her doctor determined her medical condition required asking for assistance to the bathroom, Crosthwait does not allege her injury was caused by her doctor's failure to properly assess her medical needs. And Crosthwait does not contend her injury was caused by medical treatment or Morgan's want of professional skills.

¶30. The majority frames Crosthwait's allegations as claiming Morgan negligently made two professional assessments: (1) Crosthwait's medical condition necessitated an ill-fitting stool to take a shower, and (2) Crosthwait, based on her medical condition, did not need assistance across a wet bathroom floor. The majority finds that expert testimony is needed to determine whether both assessments were negligent.

¶31. I disagree. The injury here did not involve a negligent assessment of Crosthwait's condition. Rather, Crosthwait alleges her injury arose out of a dangerous condition created by Morgan—a wet bathroom floor. And drying a wet floor or ensuring hospital patients traverse safely through a known, dangerous condition does not fall within the scope of either a hospital's licensed activities or Morgan's professional services. Instead, it falls within the

standard of reasonable care incumbent on hospitals and, for that matter, any business.

¶32. Morgan admitted in her deposition that she did not "have to know anything as a nurse to do anything that [she] did in connection with this incident of getting [Crosthwait] in and out of the shower." Because Morgan's testimony illustrates she was not drawing on any *medical* skills during the shower incident, I am left wondering what type of *medical* expert the majority would have Crosthwait offer to establish the appropriate standard of care. In this case, I simply find a jury does not require expert testimony to determine what a reasonable person in Morgan's position would have done in these circumstances.

¶33. This case is certainly distinguishable from cases this court and the Mississippi Supreme Court have found to fall within medical-malpractice statutes and require expert testimony. In *Chitty*, the plaintiff's claim arose out of what she alleged was an unnecessary biopsy and a fraudulent diagnosis of cancer. *Chitty*, 16 So. 3d at 775-76 (¶4). So the rendering of a profession medical services itself was the source of the alleged injury. *Id.* at 779 (¶13). And expert testimony was required to determine whether a reasonable dermatologist would have performed a biopsy. *Id.* Here, Crosthwait was not undergoing a medical procedure. *Cf. Kastler v. Iowa Methodist Hosp.*, 193 N.W.2d 98, 101-02 (Iowa 1971) (holding that a hospital's giving showers to its patients is not a professional activity).

¶34. *Howell* involved a patient's fall. *Howell*, 1 So. 3d at 901-02 (¶2). But in *Howell*, the patient fell from a piece of medical equipment—an X-ray table—during the performance of a medical procedure—a cervical X-ray requiring the plaintiff to lie in an inverted position. *Id.* Because the plaintiff alleged her injury arose out of the hospital's failure to inspect and

maintain its medical equipment, this court determined the jury required expert testimony regarding the specialized knowledge of how to safely X-ray patients. *Id.* at 902-04 (¶¶4, 8).

¶35. In *Lyons*, a patient fell while being assisted from the restroom. *Lyons v. Biloxi H.M.A., Inc.*, 925 So. 2d 151, 152-53 (¶¶5-10) (Miss. Ct. App. 2006). Although more factually similar than *Howell*, *Lyons* is distinguishable on the determinative issue—the allegation of what caused the injury. The plaintiff in *Lyons* alleged the defendant failed to give her the requisite amount of assistance to the bathroom commensurate with her known *medical* condition, a hip replacement performed two days earlier. *Id.* at 152-53 (¶¶2, 10). The plaintiff alleged, based on her hip surgery, the physical therapists assisting her should have known she could not hold a standing position while waiting for a wheelchair. *Id.* at 154 (¶16). Further, as in *Howell*, Lyons's injury occurred while physical therapists were using a type of medical equipment known as a "gait belt." *Id.* at 155 (¶19). Because the plaintiff challenged what the physical therapists should have known about her medical condition and took issue with the medical equipment they should have used to transport her, this court found expert testimony was necessary to establish the standard of care. *Id.* at 155 (¶19).

¶36. The majority relies on *Bell*. As in *Lyons*, the plaintiff in *Bell* alleged her fall from her hospital bed arose out of a failed assessment of her medical condition. *Bell*, 523 So. 2d at 1032-33. The plaintiff claimed the nurse was negligent in failing to use bed rails because a reasonable nurse would have known the sedative effect of the drugs she administered to the plaintiff. *Id.* at 1032. And a reasonable nurse would have used bed rails to prevent the sedated plaintiff from falling. *Id.* The Mississippi Supreme Court determined that "[a]

nurse's decision as to whether or not bed rails should be utilized entails a degree of knowledge concerning the subject patient's *condition, medication, history, etc.*" *Id.* at 1033 (emphasis added). Because the plaintiff was alleging a want of professional judgment, her claim fell within the statutory definition of professional malpractice, requiring an expert to testify about what a reasonable nurse should have known about the plaintiff's condition. *Id.* at 1032-33.

**CROSTHWAIT'S CLAIM**

¶37. In contrast, Crosthwait does not contend her injury arose based on an erroneous assessment of her medical or physical condition or the failure to provide adequate medical services based on that condition. With respect to the majority, unlike *Bell*, where the plaintiff alleged the nurse should have used bed rails, Crosthwait is not claiming she fell because Morgan should have used a better fitting or more appropriate shower chair based on her medical condition. And, unlike the plaintiff in *Lyons,* who claimed the physical therapists should have known she could not stand, Crosthwait is not claiming Morgan should have made the medical assessment she could not walk on her own. Nor does she allege her injury occurred based on negligent use or non-use of a medical device. In contrast to the X-ray table in *Howell*, Crosthwait did not fall off the shower chair.

¶38. Crosthwait instead complains Morgan took the unreasonable action of allowing a bathroom floor to pool with water and then failed to attempt to provide her safe passage out of the bathroom. She alleges an ordinary, reasonable person, knowing the floor was wet and Crosthwait was barefoot, would have provided her physical assistance or dried the floor. A

*medical* expert is not needed to address what a reasonable hospital employee should have done in the face of such a dangerous condition, as it was not a *medical* danger Crosthwait claims Morgan should have been aware of and prevented. *Cf. Bell*, 523 So. 2d at 1032.

¶39. Other jurisdictions' treatment of claims involving falls in hospital bathrooms further convinces me Crosthwait's complaint falls within the ambit of ordinary negligence, not medical malpractice. *E.g.*, *Washington Hosp. Ctr. v. Martin*, 454 A.2d 306, 308-09 (D.C. 1982) (determining the plaintiff's claim that the hospital negligently left him unattended in the bathroom, resulting in his fall and injury, was an "ordinary" negligence case, requiring no expert testimony because the issue was not whether the doctor or nursing staff failed to exercise professional judgment); *Brown v. Tift County Hosp. Auth.*, 635 S.E.2d 184, 186-87 (Ga. Ct. App. 2006) (reversing summary judgment for the defendant and finding plaintiff's claim—that the therapist who left her unattended in the shower after plaintiff twice complained she was slipping—sounded in ordinary negligence); *Self v. Executive Comm. of the Ga. Baptist Convention Ga., Inc.*, 266 S.E.2d 168, 169 (Ga. 1980) (finding the plaintiff's action was for ordinary negligence, not medical malpractice, based on her allegation that the decedent's injury was caused by the hospital's negligence in failing to properly repair a leaking bathroom fixture, of which it had notice); *Landes v. Women's Christian Ass'n*, 504 N.W.2d 139, 141 (Iowa Ct. App. 1993) (holding that the hospital's taking the plaintiff to the bathroom "was nonmedical or routine"); *Kastler*, 193 N.W.2d at 102 (holding that a hospital's giving showers to its patients is not a professional activity); *see also St. Mary's Med. Ctr. v. Bakewell*, 938 N.E.2d 820, 822 (Ind. Ct. App. 2010) (finding plaintiff's claim

that her injury was caused by the hospital's negligent maintenance of its shower could proceed as an ordinary premises-liability claim, although originally brought as a medical-malpractice claim).

¶40. These cases underscore the "mere fact that a patient falls in a hospital" does not in itself determine that a claim is for medical malpractice. *See Martin*, 454 A.2d at 309. Instead, the controlling question is whether professional skill and judgment were required.

¶41. Because I find Crosthwait's allegations sound in ordinary negligence, I would reverse.

¶42. The trial court granted summary judgment for failure to comply with the medical-malpractice statutes and failure to provide expert testimony. Finding such procedures and testimony unnecessary to make a prima facie case, I would remand this matter for a jury to determine whether Morgan breached her duty of ordinary care and, if so, whether such breach was the proximate cause of Crosthwait's injuries. Therefore, I dissent.

**LEE, C.J., AND ROBERTS, J., JOIN THIS OPINION. IRVING, P.J., JOINS WITH SEPARATE WRITTEN OPINION.**